

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
36.12.101, definitions and ARM)	AND ADOPTION
36.12.107, filing fee refunds and the)	
adoption of New Rule I (36.12.117),)	
objection to application)	

To: All Concerned Persons

1. On October 4, 2007, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-123 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 1527 of the 2007 Montana Administrative Register, Issue No. 19.

2. The department has amended ARM 36.12.101 as proposed. The department has amended ARM 36.12.107 and adopted New Rule I (36.12.117) as proposed but with the following changes from the original proposal, matter to be stricken interlined, new matter underlined:

36.12.107 FILING FEE REFUNDS

(1) through (6) remain as proposed.

(7) A refund of the Objection to Application filing fee will not be authorized if ~~an objector~~ a person objecting to a proposed application under 85-2-308, MCA, does not correct the deficiencies identified in the Objection Deficiency Notice by the deadline specified in the notice.

(8) remains as proposed.

NEW RULE I (36.12.117) OBJECTION TO APPLICATION

(1) and (2) remain as proposed.

(3) Persons owning separate water rights must each file ~~an~~ their own Objection to Application form. For example, if person A owns a water right and B owns a different water right and both want to file an objection to the same application, owner A and owner B must each file ~~a separate objections~~ Objection to Application form.

(4) remains as proposed.

~~(5) Only a whose signature appears on a valid Objection to Application will be allowed to participate in an administrative hearing. An entity filing objections must be represented by legal counsel in any administrative hearing before the department. One co-owner cannot represent another co-owner (see unauthorized practice of law 37-61-201, MCA).~~

(5) Each objector who wants to participate in the department's contested case hearing must sign the Objection to Application form.

~~(7) (6)~~ An Objection to Application is timely if the postmark date on the form is on or before the objection deadline stated in the public notice of the application. A fax of the Objection to Application form will be accepted, provided the original

Objection to Application form is postmarked or hand-delivered timely. Electronic mail (e-mail) submissions of the Objection to Application will not be accepted.

~~(6)~~ All corporations, limited liability companies, trusts, partnerships, associations, and groups of individuals (unless each person appears pro se) must be represented by an attorney licensed to practice in the state of Montana in order to participate in a formal proceeding before the department, including but not limited to a contested case proceeding. This list is not exhaustive (see 37-61-201, MCA). Failure to retain required legal representation will result in dismissal of the Objection to Application.

~~(8)~~ (7) An Objection to Application filed with the department before an application has been published will not be accepted and will be returned.

~~(9)~~ (8) Upon receipt of an Objection to Application or response to an Objection Deficiency Notice, the department will place the envelope postmark date on the form. If the postmark date is not legible, the department will assign the date as two days prior to the department's receipt of the objection form. An objector is solely responsible for ensuring timeliness, a legible postmark, and filing of the objections.

~~(10)~~ Fax or electronic mail (e-mail) submissions of the Objection to Application will not be accepted.

~~(11)~~ (9) An Objection to Application is correct and complete if it includes the following legible information:

- (a) filing fee;
- (b) objector's name and mailing address;
- (c) name of the water right applicant;
- (d) water right application number;
- (e) if an objector is claiming the objector's water right will be adversely affected if the application were granted, the objector must provide the department-assigned water right number. If the water right was exempt from the statewide water right filing requirements and is not on record with the department, the objector must provide the following information:

- (i) date of first use;
- ~~(ii) name of the appropriator;~~
- ~~(iii)~~ (ii) source;
- (iii) means of diversion;
- (iv) type of use (stock or domestic);
- (v) the flow rate and volume of water used;
- (vi) the point of diversion; and
- (f) facts indicating that the application does not meet one or more of the applicable criteria set forth in 85-2-302, 85-2-311, 85-2-316, 85-2-402, 85-2-407, or 85-2-408, MCA. The facts provided must specifically describe why or how one or more of the criteria are not met;

- (g) facts explaining how the objector person has standing to object. To have standing, ~~an objector~~ a person must have property, water rights, or other interests that would be adversely affected were the application to be granted. The objection must describe how the ~~objector's person's~~ person's property, water rights, or interests will be adversely affected if the water right application were granted; and

(h) ~~notarized~~ signature of the objector or the objector's legal representative. If a representative of the objector other than objector's attorney signs the Objection to Application affidavit, the representative shall state the relationship of the representative to the objector and provide documentation demonstrating the authenticity of that relationship, ~~such as a copy of a power of attorney.~~

~~(42)~~ (10) An objection that is deemed correct and complete and valid pursuant to 85-2-308(3) and (6), MCA, may proceed to an administrative hearing. The administrative hearing will be limited to the criteria objected to in the objection. An objector may participate in the administrative hearing only on the criteria to which the objector specifically objected and which is determined valid by the department.

~~(43)~~ (11) The department will mail notice to the objector of the Objection to Application of any deficiencies in the objection. ~~The information requested in the Objection Deficiency Notice must be postmarked or hand delivered to the department within 15 days from the date on the Objection Deficiency Notice.~~ The objector must address the information requested in the Objection Deficiency Notice and must have the response postmarked or hand delivered to the department within 15 calendar days from the date on the Objection Deficiency Notice. A fax submission of the deficiency letter response will be accepted provided the original response is postmarked timely. Electronic mail (e-mail) submissions of a response will not be accepted.

~~(44)~~ (12) If the objector does not correct the deficiencies as determined by the department by the deadline, the objection will be terminated without further notice.

~~(45)~~ (13) The department will document a valid objection by completing an objection validity form.

~~(46)~~ (14) The department will determine on which criteria the objector has filed a valid objection.

~~(47)~~ (15) An objection may be withdrawn at any time in writing. A party withdrawing an objection will not be considered a party by the department to any hearing that may be held by the department.

~~(48)~~ (16) An applicant is not required to meet a water quality criterion when a valid water quality objection is not raised or is withdrawn.

~~(49)~~ (17) Private agreements between applicants and objectors which provide for the withdrawal of objections and include conditions that must be met by an applicant or objector may not be recognized by the department or included in a granted application. The department will only place a condition on a granted application if the department determines the condition is necessary to meet the application criteria.

3. The following comments were received and appear with the agency's responses:

COMMENT 1

DNRC received several comments regarding proposed New Rule I(3) (36.12.117) which provides that persons owning separate water rights must each file their own Objection to Application form. One commenter raised concerns on how this would

affect judicial economy, and that it would be harmful to groups that are organized for the purpose of representing ditch and canal companies in the objection process.

RESPONSE 1

DNRC believes that adopting the rule in its current form is necessary to implement 85-2-308, MCA, which provides that a person has standing to file an objection if the objector's property, water rights, or interests would be adversely affected by the proposed appropriation. Additionally, 85-2-311(1)(b), MCA, states that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

COMMENT 2

DNRC received several comments regarding proposed New Rule I(5) (36.12.117) pertaining to the requirement that entities filing objections must be represented by an attorney in administrative hearings before the department. One commenter stated that implementing this requirement would discourage or prevent certain entities, such as family-owned farms and ranches, from raising legitimate objections.

RESPONSE 2

This part of the rule is being deleted from this rulemaking. The unauthorized practice of law pertains to representation by an attorney during contested case hearings, which rules are found in ARM 36.12.201, et seq. Also, refer to Response 3 below.

COMMENT 3

DNRC received several comments regarding proposed New Rule I(6) (36.12.117) pertaining to the requirement that certain entities and groups must be represented by an attorney in formal proceedings before DNRC. One commenter stated that the term "groups of individuals" is not defined in this rule and believes it should be. The commenter also stated that "groups of individuals" should not be required to retain an attorney in formal proceedings before DNRC. Another commenter stated that New Rule I(6) (36.12.117) exceeds the authority in 37-61-201, MCA, because many formal proceedings are not presided over by an individual appointed by the court, and voiced concerns that "formal proceedings" was not defined.

RESPONSE 3

This part of the rule is being deleted from this rulemaking. As stated in Response 2, the unauthorized practice of law pertains to representation during contested case hearings; therefore, DNRC has determined that it is not necessary to adopt a rule pertaining to legal representation in this rulemaking. However, deletion of the rule does not mean that the department will permit the unauthorized practice of law.

COMMENT 4

DNRC received several comments regarding its proposed New Rule I(10) (36.12.117) pertaining to the disallowance of fax or e-mail submissions of Objections to Applications. One commenter suggested that it should be allowable for an Objection to Application to be hand-delivered on or before the date objections are

due. Another commenter suggested that fax or e-mail should be allowed for submitting the Objection to Application, so long as the original is received within three mailing days of the receipt of the fax or electronic mail copy.

RESPONSE 4

DNRC has reconsidered this rule proposal, and has agreed to modify the proposed rule to allow for acceptance of a fax filing of an Objection to Application with DNRC, and so that hand-delivery of a timely Objection to Application is also acceptable. DNRC agrees that the original Objection to Application should follow in the mail; therefore, DNRC will modify the rule to reflect that an original Objection to Application form must be postmarked timely, if an objector decides to file the Objection to Application form by fax. E-mail submissions will not be allowed.

COMMENT 5

DNRC received several comments regarding proposed New Rule I(11)(f) (36.12.117), pertaining to "facts" in the Objection to Application to support an objector's position. One commenter stated that the rule does not provide any added interpretation other than what is already in the statute. This commenter suggested that the new rule should require "probable and believable information sufficient to establish that the proposed use does not meet one or more of the applicable criteria..." and that for each specific criterion objected to, the "information must be sufficient to support a reasonable factual or legal basis as to why the criterion cannot be met by the proposed application." Another commenter suggested that the sentence that provides "[t]he facts provided must specifically describe why or how one or more of the criteria are not met;" should be deleted in order to allow objectors the time to retain experts and utilize the discovery process to be able to provide "specific descriptions" of such facts. The commenter suggested that there is no requirement in 85-2-308, MCA, that requires such specificity.

RESPONSE 5

DNRC believes that adopting the rule in its current form is necessary to clarify what facts objectors are basing their objections on in a permit or change hearing under 85-2-309, MCA. Section 85-2-308, MCA, requires the objector to provide facts indicating that one or more of the criteria are not met. This proposed rule provides further guidance as to what the statute means by use of the word "facts," by requiring an objector to more specifically describe how or why one or more of the criteria are not met. DNRC is aware that an objector may not know all the specific facts that support the objections raised at the time the Objection to Application is filed. However, DNRC believes an objector should have knowledge of some specific facts as to how or why the objector believes one or more of the criteria have not been met, and this is what is required under the statute.

COMMENT 6

DNRC received several comments regarding proposed New Rule I(11)(g) (36.12.117), pertaining to "facts" in an Objection to Application to support when an objector has standing to object to an application. One commenter felt that "facts" should be replaced with "information" to provide a broader interpretation of facts that

must be provided at the objection stage. The commenter was also uncertain to what extent an objector must describe how the objector's water rights will be adversely affected (i.e., will the objector be required to present hydrologic or other technical evidence at the time the Objection to Application is filed). Another commenter suggested the rule be revised to be more interpretative of the statute. The commenter suggested that the new rule should require "probable and believable information sufficient to establish that the objector has standing..." and that the information must identify the property and how the objector will be injured; identify the water right, etc., of a prior appropriator and how it cannot be reasonably exercised; or identify membership interests and the information required to meet both of the above.

RESPONSE 6

DNRC believes that adopting the rule in its current form is necessary to implement 85-2-308, MCA, requiring an objector to have standing to file an objection to an application. The proposed rule requires the objector to provide more specific facts showing how or why the objector's property, water rights, or interests will be adversely affected. This will allow DNRC to better evaluate whether an objector has legal standing to file an Objection to Application with DNRC.

COMMENT 7

DNRC received several comments regarding proposed New Rule I(12) (36.12.117), which provides that the hearing will be limited to the criteria objected to in the objection, and that the objector may participate in the contested case based upon the criteria to which the objector specifically filed an objection. One commenter raised concerns with placing limitations on an objector's right to participate, and suggested that at a minimum, this not occur until after the parties are given an opportunity to conduct discovery. This is for the reason that often, the public notice is an abbreviated version of the application and many objectors do not know the details of the proposal from the public notice, and many times the application itself, to be able to fully understand it and be able to tailor the objection accordingly. The commenter stated that discovery allows the objector the opportunity to recognize the potential impact from a proposed application. The commenter also suggested that the rule may be in conflict with 2-4-612(1), MCA, which requires "opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved" in an administrative contested case.

Several other commenters shared the same concerns about how the proposed rule is written, in that they felt the rule would essentially not allow objectors the opportunity to amend their objections if an applicant later amends their application. Another commenter suggested that many of the application criteria are interrelated, and while some are very simple, many times they contain hand-drawn sketches, and new issues can surface throughout the objection and hearing process. A suggestion was raised to amend the language to state: "[n]othing in this rule precludes an objector from amending an objection to an application when the objector has obtained additional information to support additional grounds for objection."

RESPONSE 7

DNRC believes that adopting the rule in its current form is necessary to implement 85-2-309, MCA, which requires DNRC to hold a contested case hearing on the objection if an objection to an application states a valid objection. The parties have the opportunity to review the application in its entirety, including the Application Review form, once it is publicly noticed. Therefore, an objector should have a fairly good understanding of the proposed project, and whether or not they should file an objection on certain criteria.

Additionally, in a contested case hearing, DNRC does not control the discovery process; however, DNRC acknowledges that most objectors modify their position once it becomes clear after discovery what the applicant is proposing. DNRC does not believe this rule prohibits an objector from supplementing the objector's information to support the objections that have been deemed valid during the contested case process. However, once an objection is deemed valid, an objector may not raise an objection to other criteria that were not included in the original Objection to Application. As for the issue of an applicant amending an application, the Court in the *Bitterroot River Protection Ass'n v. Siebel*, 326 Mont. 241, 108 P.3d 518 (2005), held that if an application is amended so significantly that the original application essentially constitutes a new application, the application would have to go through the correct and complete process again, resulting in a new priority date assigned to the application and republication to provide other objectors the opportunity to file an Objection to Application with DNRC.

COMMENT 8

DNRC received several comments regarding proposed New Rule I(13) (36.12.117) pertaining to the 15-day response time for objectors to respond to an Objection Deficiency Notice. One commenter remarked that the timeframe was inadequate, especially if an application is particularly sophisticated. The commenter also noted that applicants are allowed approximately 30-90 days to address deficiencies in an application, and stated that objectors should be given the same opportunity.

RESPONSE 8

The 15-day objection deficiency letter response time is set in 85-2-308, MCA, and therefore cannot be changed.

COMMENT 9

DNRC received a comment regarding proposed New Rule I(19) (36.12.117) stating that a new rule should be added to (19) and renumber existing (19) as (20), so that the new (19) would read as follows: "If an applicant has filed a correct and complete application and no valid objection has been filed, or if a valid objection has been filed and withdrawn, and the department has not served a statement of opinion under 85-2-310, MCA, on the applicant, the application shall be deemed to meet the standard of proof and a permit or change in appropriation right issued."

RESPONSE 9

The DNRC takes note and will consider this comment in further application processing rules. However, the department would like to clarify that a "correct and complete" application does not necessarily meet the standard of proof by a "preponderance of the evidence" required for permits and change in use applications, 85-2-311 and 85-2-402, MCA.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Anne Yates

ANNE YATES

Rule Reviewer

Certified to the Secretary of State March 17, 2008.